UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	.	**Chapter 11**
Island View Crossing II, L.P.,	.	
Debtor.	.	**Bankruptcy #17-14454 (ELF)**
Kevin O'Halloran, In His Capacity As Chapter 11 Trustee For Island View Crossings II, L.P.,	.	
Plaintiff,	.	
v.	.	
Prudential Savings Bank, et al.,	.	**Adversary #17-0202 (ELF)**
Defendants.	.	**Adversary #18-0280 (ELF)**

Philadelphia, PA
August 13, 2021
1:56 p.m.

TRANSCRIPT OF TELEPHONIC BENCH OPINION

BEFORE THE HONORABLE ERIC L. FRANK
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

No Attorneys Were Present During The Ruling

Audio Operator:

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THE COURT: Presently before the court are two adversary proceedings, consolidated for trial, titled Kevin O'Halloranvs.Prudential Savings Bank. The adversary numbers are 17-202 and 18-280. The adversary proceedings are related to the bankruptcy case of Island View Crossing II, LP, bankruptcy #17-14454.

The first adversary proceeding, #17-202, which I will refer to as the lender liability action, consists of the Trustee's lender liability complaint and the response thereto. The debtor commenced this action in the Court of Common Pleas, Philadelphia County, Pennsylvania, prior to the filing of the bankruptcy case. Let me make a correction. I'm not sure it was in Philadelphia County, but it was in the Court of Common Pleas, the initial filing. The common pleas action was subsequently removed to the bankruptcy court, and upon appointment of the chapter 11 Trustee, Mr. O'Halloran, he succeeded the debtor as the plaintiff.

The second adversary proceeding, 18-280, which I will refer to as the avoidance and subordination action, consists of claims brought by the Trustee for avoidance and recovery of transfers and equitable subordination of Prudential's claim in this bankruptcy case. Presently before the court are the Trustee's motion for partial summary judgment, which was filed only with respect to the Trustee's claims in the avoidance and

subordination action, and Prudential's motion for summary judgment filed with respect to all claims asserted by the Trustee in both adversary proceedings.

Today I am issuing my bench opinion explaining my ruling upon both motions. An order will be entered on the docket setting forth the terms of the ruling. The reasons for the decision are being stated in this bench opinion, recorded today, August 13, 2021. However, because this will be a very lengthy bench opinion, rather than employing my usual practice of placing an audio file on the docket, instead, I will obtain a transcript of this recorded bench opinion which will allow me to edit it before docketing the transcript as my bench opinion. Once docketed, the document will constitute my opinion explaining the reasons for my ruling on these two motions.

As this is a bench opinion that is unpublished and the parties are familiar with the procedural and factual background, I will set out only those parts of the procedural and factual history necessary to make this bench opinion generally comprehensible. A more complete discussion of the background of the parties' dispute is set out in this court's memorandum of May 23rd, 2019, which is reported at 604 Bankruptcy Reporter 181. That decision granted in part and denied in part Prudential's motion to dismiss the complaint. In that decision I ruled that while some of the Trustee's

avoidance claims, including all of the claims under 12 Pa.C.S. §5105, were not adequately pled in the complaint and would be dismissed with leave to amend, four of the Trustee's avoidance claims under 12 Pa.C.S. §5104(a) were adequately pled, and therefore survived dismissal. My decision also denied Prudential's motion to dismiss the Trustee's equitable subordination claim.

After that decision, the Trustee did not file an amended complaint. Thus, the Trustee's claims presently before the court in the lender liability action are claims for breaches of the lending contract, including the covenant of good faith and fair dealing, the implied covenant of good faith and fair dealing, and tortious interference with contract. In the avoidance and subordination action the claims are for avoidance of four transfers under 12 Pa.C.S. §5104(a) and 11 U.S.C. §544, and for equitable subordination of Prudential's claim to all other claims in the bankruptcy case.

As I stated at the outset, the parties have filed competing motions for summary judgment pursuant to Federal Rule of Civil Procedure 56, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. I have previously discussed the legal standard for summary judgment motions in reported decisions. I will not burden this bench opinion with an oral recitation of the various

legal principles governing summary judgment motions. Instead, I will simply cite and incorporate by reference my discussion of the issue in the case In Re Polichuk, 506 B.R. 405, 420-422 (Bankr. E.D. Pa 2014).

To address the parties' dueling motions for summary judgment, I begin with the Trustee's fraudulent transfer claims. The Trustee has filed these claims under §544(b)(1) of the Bankruptcy Code which, generally speaking, grants to the Trustee whatever avoidance powers are available to unsecured creditors under non-bankruptcy law. See, e.g., In Re Equipment Acquisition Resources, Inc., 742 F.3d 743, 746 (7th Cir. 2014). §550 of the bankruptcy code permits the Trustee to recover for the estate the value of any avoided transfers. The Trustee seeks to avoid and recover four transfers under Pennsylvania's Uniform Fraudulent Transfer Act, which as I explain later has been amended and renamed. The statute is codified at 12 Pa.C.S. §§5101 through 5114.

Before identifying the four transfers at issue, it is helpful to set out and name a number of transactions and property transfers that form the basis of the Trustee's claims. And at the outset, I will state that, in the interest of brevity, from time to time I will state the amounts in the transactions in round numbers, not exact numbers.In the first transaction, in 2011, the debtor granted Prudential a 3.9-million-dollar mortgage on its main asset, a piece of real

estate. This mortgage is referred to by the parties as the "Steeple Run Collateral Mortgage". Second, in 2013 Prudential lent the debtor $1.3 million in a transaction I will refer to as the "2013 IVC loan", or the "IVC loan transaction". The Trustee asserts that some of the loan proceeds in this transaction were transferred for the benefit of Prudential and that those money transfers should be set aside. The third transfer also made in the 2013 IVC loan transaction was the debtor's grant of a mortgage on its real estate to Prudential. For reasons I will explain in a moment, I will refer to that mortgage as the "Durham mortgage", a mortgage that the Trustee seeks to set aside. Fourth, in 2014 the debtor granted Prudential a 5.1-million-dollar mortgage. This mortgage is referred to by the parties as the "Calnshire collateral mortgage". Fifth, later in 2014, following the Calnshire collateral mortgage transaction, Prudential loaned the debtor $5.5 million secured by a mortgage on the debtor's real estate in a transaction that I will call the "IVC construction loan", which was secured by what I will call the "IVC Construction Mortgage". In the Court's order of May 23rd, 2019, I dismissed the avoidance claims with respect to the IVC Construction Mortgage granted in 2014. I mention it now only for purposes of completeness as it is central to the Trustee's limited liability claims, but of course not to the avoidance claims.

Turning back to the avoidance claims, the Trustee alleges that the following four transfers are voidable under §5104(a)(2) of 12 Pa.C.S. 1) The debtor's grant of the 3.9-million-dollar Steeple Run collateral mortgage; 2) The debtor's transfer of approximately $1.1 million to Prudential that was used to reduce Durham Manor's debt to Prudential, Durham Manor being an affiliate of the debtor, the $1.1 million being derived from the loan proceeds of the 2013 IVC loan. Third, the debtor's grant of the 1.4-million-dollar Durham mortgage granted in connection with the 2013 IVC loan. And fourth, the debtor's grant of the 5.1-million-dollar Calnshire collateral mortgage in 2014.

Under 12 Pa.C.S. §5104(a)(2), a transfer made or obligation incurred by a debtor is voidable if the debtor made the transfer or incurred the obligation without receiving equivalent value in exchange and 1) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business transaction; or 2) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due.

The first element that a plaintiff must establish under §5104(a)(2) is that the debtor made the transfer or incurred the obligation without receiving reasonably equivalent value

in exchange. In the May 23rd, 2019 memorandum, I concluded that the avoidance and subordination complaint adequately pled that the debtor did not receive reasonably equivalent value for the transfers in question. More specifically, I rejected Prudential's argument that the transfers indirectly benefitted the debtor by supporting its affiliated entities and their shared principal, Renato Gualtieri,

I noted in that memorandum that the value received by the debtor for purposes of §5104(a)(2) is determined by analyzing what the debtor received that is useful to the debtor's creditors. Since the complaint alleged that the debtors received nominal consideration, $1, for granting the Steeple Run and the Calnshire collateral mortgages each, and only fractional consideration, that is approximately $280,000 of the $1.4 million of proceeds related to the Durham mortgage, I held that the complaint adequately pled that the debtor did not receive reasonably equivalent value for these transfers.

In their respective motions, the parties do not focus heavily on the reasonably equivalent value element of §5104(a)(2. Nor do they dispute most of the basic facts concerning these transfers, as alleged in the complaint. The Trustee notes that I have already determined that any value the non-debtor entities received as part of these transactions did not constitute value received by the debtor. And given

the obvious disparity between what the debtor gave away and what the debtor received, the Trustee asserts that there is no present factual dispute regarding whether the debtor received reasonably equivalent value for the transfers. Prudential makes a minor evidentiary argument, which I will discuss momentarily, regarding the amount of value the debtor received in connection with the September 2013 loan agreement. However, Prudential primarily focuses its argument on the other elements of §5104(a)(2), namely subsection (i), whether the transfer left the debtor with unreasonably small assets, and subsection (ii), whether the debtor should have reasonably believed that it would incur debts beyond its abilities to pay as they came due.

Upon review of the evidence submitted, I am satisfied there is no material factual dispute regarding whether the debtor received reasonably equivalent value for the challenged transfers. The undisputed evidence shows that the debtor received nominal consideration in exchange for grants of the Steeple Run and Calnshire collateral mortgages, both multi-million-dollar mortgages. These collateral mortgages encumbered the debtor's property by millions of dollars, at least according to the face value of the mortgages, and in exchange, the debtor only received nominal consideration, $1 per transaction. It is therefore beyond dispute that the debtor did not receive reasonably equivalent value from

Prudential in the Steeple Run and Calnshire collateral mortgage transactions.

The evidence regarding the value the debtor received in connection with the September 2013 IVC loan is more complicated. Under the terms of the September 2013 IVC loan agreement, the debtor executed a promissory note along with two other co-obligors in exchange for a 1.4-million-dollar loan from Prudential, and in connection with this loan agreement the debtor also executed and delivered to Prudential a mortgage and security agreement that pledged the debtor's real property as collateral for the loan. In connection with the September IVC 2013 loan agreement, therefore, the debtor received $1.4 million in funds, incurred an obligation to repay the 1.4-million-dollar loan, and transferred a mortgage to Prudential securing the repayment. What creates an issue regarding this agreement is that it required the debtor to use the proceeds of the loan to pay certain settlement costs and to reduce the balance due on Durham Manor LLC's outstanding loan to Prudential, Durham Manor being an affiliate of the debtor. Thus at first blush the loan agreement seems to indicate the debtor did not receive any value from this transaction, with the Durham Manor entity receiving the entire benefit through a reduction of its loan balance to Prudential. However, the loan agreement also specified that monies received by Prudential from subsequent sales of select Durham

Manor lots would be used to fund, among other things, certain site preparation and pre-construction projects at the IVC property. The amount allocated for this back-end funding of IVC's property development appears to be capped at $375,000, with an additional $125,000 to be paid to the debtor as a reimbursement of closing costs. See Exhibit-2 page 16 of the attached to the Trustee's motion for summary judgment.

The remainder of monies received by Prudential from sales of Durham Manor lots would be allocated back into Gualtieri entities as follows: loan payments: $147,500; Durham Manor construction: $200,000; a refund to Durham Manor for an RDA payment of $120,000; and Calnshire's interest reserve: $100,000; Island View reserve for monthly payments: $50,000; an advance to AmeriCorp, another Gualtieri entity, for operating expenses: $302,250. Thus, September 2013 loan agreement shows that the debtor was not contractually entitled to receive the full proceeds of the 1.4-million-dollar loan that it obligated itself to repay and for which it secured, or it encumbered, the IVC property.

I recognize that the loan agreement planned for some of the loan proceeds ultimately to be funneled back to the debtor in some form. However, a substantial amount of the loan proceeds were never intended to be realized by the debtor in any way. Thus, based on the loan agreement alone, I conclude

that the debtor did not receive reasonably equivalent value for incurring the 1.4-million-dollar debt secured by a mortgage on its property. That said, it may prove helpful to the parties for me to comment briefly regarding a factual dispute raised by the parties regarding the precise amount that Prudential was to funnel back to the debtor under the terms of the September 2013 loan agreement. The Trustee relies on an analysis of various disbursements, see Exhibit-20, to conclude that only $280,829.84 of the September '13 loan ultimately benefitted the debtor. Prudential counters that the Trustee's own spreadsheet omits several significant distribution of funds, totaling $225,000, that the debtor also received on account of lot sales at Durham Manor. Upon review of the document relied upon, I agree that a genuine factual dispute is present regarding the true payee of some of the payments listed in the document. Indeed the Trustee's own analysis indicates that as much as $270,977.20 in disbursements have unknown beneficiaries. See Exhibit-20 at page 13. (This is Exhibit-20 to the Trustee's motion). However, in the end, this factual dispute is not material at this stage of the case. Even accepting Prudential's assertions regarding these payments, the evidence shows that the debtor would only have ultimately received a little more than $500,000 in value in exchange for a 1.4-million-dollar loan and accompanying mortgage. Thus I remain satisfied that

the evidence shows conclusively that the debtor did not receive reasonably equivalent value from Prudential in the September 2013 loan transaction.

Should the Trustee ultimately prevail in the avoidance and recovery action, the precise amount that the debtor received in connection with this loan will be relevant in determining the scope of the relief to be granted to the Trustee. But such a determination is presently not necessary because the Trustee's motion is being denied on other grounds, which I will get to. Having found the evidence shows that the debtor did not receive reasonably equivalent value in the four challenged transfers, I therefore turn to an analysis of whether the evidence is sufficient to grant summary judgment to either party based on subsections (i) and (ii) of §5104(a)(2) of 12 Pa.C.S. As previously

stated, §5104(a)(2)(i) and (ii) provide that a transfer made or obligation incurred by the debtor is voidable if the debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange and either was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due.

The commentary to §5104 points out that the tests under subsections (a)(2)(i) and (ii) should be viewed as addressing slightly different aspects of the same fundamental inquiry, whether the debtor is and on a continuing basis will be able to pay its debt as they become due. See Committee comment #4 (1984). I digress for a moment to acknowledge that the committee comment I've just cited was made in connection with the drafting and enactment of the Pennsylvania Uniform Fraudulent Transfer Act in 1984 (PUFTA) and that PUFTA was amended in 2017 and is now called the Pennsylvania Uniform Voidable Transaction Act, (PUVTA) There are new comments to PUVTA, but nothing in my view in the new comments serves to undermine the relevance of the prior comments that I've just referenced, so I will rely on them in construing the statute.

Turning back to the text of the statute now, subsection (i) tests whether a transfer leaves the debtor with unreasonably small assets to sustain its operations. As I wrote in the May 23rd, 2019 memorandum, the subsection (i) test does not require insolvency. Instead, the analysis looks at whether the enterprise's failure was reasonably foreseeable. See Peltz v. Hatten, 279 B.R. 710, 744, (D. Del. 2002), citing Moody, vs. Security Pacific Business Credit, Inc., 971 F.2d 1056,

1073 (3d Cir. 1992), where the court states that the test for unreasonably small capital is reasonable foreseeability.----------

In the context of an operating business, this test asks whether the transfer in question left the debtor with an inability to generate sufficient profits to sustain operations. See In Re Fidelity Bond & Mortgage Company, 340 B.R. 266, 294, (Bankr. E.D. Pa 2006). Subsection (i) therefore focuses attention on whether the amount of all the assets retained by the debtor was inadequate, that is unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage. See 12 Pa.C.S. §5104 comment 4. See also United States vs. Rocky Mountain Holdings, Inc., 782 F.Supp. 2d 106, 118-119, (E.D. Pa 2011).

The ability to avoid a transfer of assets that leaves the transferor with unreasonably small assets does not serve as a basis for second guessing business deals that just simply do not work out. See In Re R.M.L., Inc., 92 F.3d 139, 155, (3d Cir. 1996). Rather, this provision is aimed at transactions where the parties should know that the deal will leave the transferor technically solvent but doomed to fail. MFS Sun Life Trust High Yield Series vs. Van Dusen, Airport Services Company, 910 F.Supp. 913, 944, (S.D.N.Y. 1995). Subsection (ii) of §5104 is closely related to subsection (i), but focuses more on the debtor's intentions and beliefs

regarding its ongoing financial condition. In particular, subsection (ii) tests the reasonableness of the debtor's beliefs with regard to whether the transfer or obligation in question will impair its ability to pay its debts as they become due.

Before moving to a discussion of the parties' arguments and the evidence submitted, one more provision of the PUVTA warrants mention. §5101(b) provides definitions for the statute, including a definition of the term "asset", which it defines broadly as property of the debtor. However, §5101(b) excludes from the definition property to the extent that it is encumbered by a valid lien. Thus, if a debtor owns property that is completely encumbered by liens, that property is not considered an asset of the debtor under §5101, or if that property is only partially encumbered, then §5101 dictates that only the unencumbered portion of the property will be considered an asset of the debtor. The net effect of this provision is to exclude property interests that are beyond the reach of unsecured creditors from the definition of asset for the purpose of these provisions. See 12 Pa.C.S. §5101 committee comment #2 (1984).

A committee comment to this section also states that in the case of property encumbered by a lien securing a contingent obligation, such as a guarantee, in general it would be appropriate to value the obligation by discounting

the face amount of the debt to reflect the probability that the guarantee will ever be called upon. See also Siematic, Mobelwerke,GmbH & Co. KG 4 v. Siematic Corp., 643 F.Supp. 2d 675, 691, (E.D. Pa. 2009).

I will discuss these legal principles in connection with each challenged transfer starting with the 2011 Steeple Run collateral mortgage.

The Trustee's argument with respect to the 2011 Steeple Run collateral mortgage is straightforward. In 2011 when the debtor granted this mortgage, its only asset was its real estate, which I will call the "IVC property". After accounting for the existing mortgage on the property, which is held by the Redevelopment Authority, securing its purchase money loan to the debtor, and based upon an appraisal from May of 2011, see Plaintiff's Exhibit-12, the Trustee maintains that the debtor had about $3.4 million in equity in the IVC property, but with no working capital or other resources to fund its business operations. The 2011 Steeple Run collateral mortgage encumbered the IVC property by an amount greater than the existing equity, the face amount of the mortgage being $3.9 million plus an attorney's commission. This 3.9-million-dollar amount represented the entire principal amount of the debt that Steeple Run – (a separate entity that was a debtor affiliate) -- owed to Prudential on a land acquisition

loan from 2008. The Steeple Run Collateral Mortgage entitled Prudential to foreclose on the IVC property upon any default by Steeple Run for the entire amount of the Steeple Run land acquisition loan or, at the option of Prudential, for the amount necessary to cure the default. See Exhibit-13, the Trustee's motion.

Together with the existing RDA mortgage on the property, the Trustee argues that the grant of the Steeple Run collateral mortgage left the IVC property encumbered by approximately $6.4 million of mortgages at a time when the property was valued at only $5.8 million. And since the debtor would need several millions of dollars to begin construction on the IVC project, the Trustee asserts that the transfer of the Steeple Run collateral mortgage left the debtor at that time with unreasonably small assets in relation to its business and an inability to pay debts as they came due.

Prudential responds first by noting that in 2011 the debtor was not developing the IVC property. Prudential argues that the debtor was merely a landholding company at the time it acquired the IVC property, and remained a landholding company at least until 2013 when it took out the IVC loan. In 2011 the only obligations the debtor had were real estate taxes and RDA loan payments. Further, Prudential highlights the fact that despite the grant of the Steeple Run mortgage,

the debtor retained an ability to raise working capital. The debtor made pitches to investors, subsequent to the Steeple Run collateral mortgage, that purported to show significant earnings potential in the IVC project. Debtor's principal, Gualtieri, testified at his Deposition that he did not believe that granting the Steeple Run collateral mortgage would impair the debtor's ability to make its RDA loan payments. In addition, the debtor borrowed additional funds from Prudential, just two years after granting the Steeple Run collateral mortgage, to begin construction on the IVC project. Thus, Prudential contends that the granting of the Steeple Run collateral mortgage did not leave the debtor with insufficient capital to sustain its operations nor should the debtor have reasonably believed that the mortgage would render it unable to pay its debts as they became due. After considering the competing arguments and the evidence submitted by the parties, I conclude that the issues under subsection (i) and (ii) of 12 Pa.C.S. 5104(a)(2) are not ripe for summary judgment due to the existence of disputed issues of material fact.

Discussion of subsections (i) and (ii) requires analysis of multiple subcomponents, including the assets of the debtor in 2011 and the business needs of the debtor in 2011. I'll start with the discussion of the debtor's 2011 assets, as that term is defined in §5101. The parties do not dispute that the only substantial asset that the debtor possessed in 2011

before granting the Steeple Run collateral mortgage was the IVC property. A May 2011 appraisal of the property valued it at slightly over $5.8 million. The IVC property was encumbered by a 2.5-million-dollar purchase money mortgage, leaving the debtor with approximately 3.3 to 3.4 million dollars of equity. And as stated earlier, the Steeple Run mortgage exceeded that, since it had a face value of 3.9 million. Thus if the Steeple Run mortgage encumbered the IVC property by its full face value, the IVC property would have had negative equity of approximately $500,000. Being fully encumbered by valid liens, the IVC property would not be considered an asset of the debtor, following the grant of the Steeple Run collateral mortgage. The debtor would then be considered to have no assets remaining after the transfer for purposes of §5104(a)(2)(i).

Prudential disputes this conclusion regarding the debtor's assets by making two primary arguments. First, that the collateral mortgage only encumbered the IVC property by the shortfall in the Steeple Run property's equity, and second, that the face value of the collateral mortgage should be reduced based on the probability that the Steeple Run loan would ever be called in against IVC. I will address these arguments in turn.

First, I am not persuaded by Prudential's assertion that the Steeple Run collateral mortgage at most encumbered the IVC

property by an amount equal to the shortfall of the equity in Steeple Run's own property. A few undisputed facts regarding the Steeple Run property and the Steeple Run loan must be considered first. In 2008, Prudential loaned $3.9 million to Steeple Run for the purpose of purchasing Steeple Run's real estate. Steeple Run granted Prudential a mortgage on the Steeple Run property to secure the loan. By September of 2011, when the debtor granted Prudential the Steeple Run collateral mortgage, the Steeple Run property was worth approximately $3 million and the balance of the Steeple Run loan was approximately $3.9 million.

See Gualtieri Deposition at 46 to 48.

Prudential's theory is that because the Steeple Run property had an equity shortfall of only $900,000, and assuming, as Prudential does, that the Steeple Run property would be sold first in the event of any default by Steeple Run, Prudential asserts then that the debtor would, at most, be required to cover the $900,000 difference remaining after foreclosure on the Steeple Run property. That, of course, would leave the debtor with substantial equity in the IVC property. The problem with Prudential's theory is that it conflicts with the unambiguous terms of the Steeple Run collateral mortgage. The document gives Prudential the right, upon default by Steeple Run on the Steeple Run loan, to foreclose against the IVC property for the entire principal

amount of the mortgage, or whatever amount is necessary to cure the default. Again, see Exhibit-13 to the Trustee's Motion. Prudential incorrectly asserts that because Gualtieri testified that the Steeple Run property would be sold before Prudential would pursue collection of
of any deficiency against
the IVC property
that the 900,000-dollar figure is the proper amount to be considered. Prudential has stretched Gualtieri's testimony far past its breaking point. Gualtieri merely admitted the arithmetic regarding how much encumbrance would remain on the IVC property, assuming that the Steeple Run property was sold first. See Gualtieri Deposition ats 51 to 53.
Perhaps more importantly, Gualtieri's testimony on this point is irrelevant, as the terms of the collateral mortgage control the legal rights of the parties, not Gualtieri's suppositions about what would happen in the event of a default. Under §5101, assets of the debtor do not include property to the extent that it is encumbered by a valid lien. Since the Steeple Run collateral mortgage gave Prudential the unqualified right to foreclose on the IVC property for the full amount of the balance of the Steeple Run loan, that number being $3.9 million, the existence of the additional collateral securing the Steeple Run loan is irrelevant. Thus, for purposes of determining a debtor's

assets under §5101(b), I hold that the facial amount of the mortgage or the loan balance of the underlying mortgage, if less, is the proper starting point in determining the encumbrance a mortgage places on the debtor's property.

But there is a second argument, and I turn to that second argument, which is that the face value of the collateral mortgage should be reduced based on the probability that the Steeple Run loan would ever be called. At the outset, I agree with Prudential that the 2011 Steeple Run collateral mortgage was a contingent obligation. It is undisputed that the debtor was not obligated to repay the Steeple Run loan. The debtor's obligation would be triggered only upon a default by Steeple Run, the primary obligor. In other words, the debtor effectively was a guarantor. Trustee asserts, in, that it is a well established principle that mortgages are not contingent liabilities. See Trustee's Reply Brief at 6. However, the cases cited by the Trustee do not establish a per se rule regarding mortgages. In each of the cases cited by the Trustee, it appears that the mortgagor had granted the mortgage in connection with and to secure a promissory note for which the mortgagor was the primary obligor. Thus in those cases, the mortgages and accompanying notes would properly have been considered fixed liabilities rather than contingent liabilities.

The Steeple Run and Calnshire collateral mortgages differ

from the mortgages in those cited cases in that the mortgagor, (here the debtor), was not liable under the notes and its obligation or more -- or perhaps more accurately the IVC property's obligation under the collateral mortgages only would arise upon the occurrence of a default by the primary obligors. Thus, I agree with Prudential that the collateral mortgages granted by the debtor to Prudential are contingent liabilities for purposes of a fraudulent transfer analysis under Pennsylvania law. Consequently, it is appropriate under §5101(b) to discount the face value of these mortgages by the probability that the underlying debt will come due to the debtor, here IVC. See 12 Pa.C.S. §5101 comment 2 (1984). Such a determination is necessary because §5104(a)(2) requires consideration whether the remaining assets of a debtor following a challenged transaction were unreasonably small in relation to the entity's business needs. Having agreed with Prudential that the Steeple Run collateral mortgage is contingent in nature, I conclude that there is insufficient evidence at the summary judgment stage to determine the amount or degree to which the face value of the mortgages should be discounted.

The parties have submitted little evidence regarding the risk of default by Steeple Run on the underlying Steeple Run collateral mortgage obligation. Prudential refers to a concession from Gualtieri that when the debtor granted the

collateral mortgage in 2011, Steeple Run was not in default, Prudential had never alleged a default, and that there was nothing to suggest that such a default was likely. See Gualtieri Deposition at 57-60. On the other side, the Trustee, having asserted that the collateral mortgages are not contingent, has not mounted a substantive argument or developed evidence regarding the probability that Steeple Run would default, such a default thereby entitling Prudential to foreclose on the IVC property. Thus the only evidence submitted regarding the probability that Prudential would call in the Steeple Run mortgage against IVC consists of Gualtieri's deposition testimony. However, I find Gualtieri's unadorned statement that Steeple Run was not likely to default to be minimally probative evidence at this stage of the litigation, and insufficient to permit me to discount the face value of the collateral mortgage without engaging in sheer speculation regarding the risk of Steeple Run's default. And, since the debtor's grant of the collateral mortgage resulted in a total facial encumbrance on the IVC property of approximately $500,000 more than the property was worth, I am unable to find as an undisputed fact that the debtor had any remaining assets following the transfer of the Steeple Run collateral mortgage or the amount of those assets.

But the Trustee fares no better on this issue, particularly considering that as respondent, Prudential

receives the benefit of all reasonable inferences. I have no difficulty accepting the proposition that some discount of the face value of the collateral mortgage would be appropriate, based on the contingent nature of the obligation itself. But the Trustee has pointed to no evidence that would suggest that this discount would be minimal. Therefore, I must assume that the evidence may show, especially in light of Gualtieri's Deposition testimony, that the discount to the face value of the collateral mortgage would be substantial, thereby leading to the conclusion that the debtor retained significant equity in the IVC property following the grant of the Steeple Run collateral mortgage.

In sum, I find a disputed issue of material fact remains with regard to the debtor's assets under §5101 following the transfer of the Steeple Run collateral mortgage, making it impossible to make a ruling on summary judgment. §5104(a)(2)(i) requires an analysis of whether the remaining assets of the debtor will run reasonably small in relation to the debtor's business following the transfer. Without establishing what assets remain, there is a disputed issue of fact.

I reached the same conclusion regarding subsection (ii) of §5104(a)(2). The text of subsection (ii) does not explicitly require consideration of a debtor's assets in weighing whether, in connection with the challenged transfer,

the debtor intended to incur or reasonably should have believed it would incur debts beyond its ability to pay as they become due. However, determining whether the debtor retained an ability to pay its forthcoming debts following a challenged transfer logically requires consideration of the assets that the debtor retained from which a debtor could pay those bills or raise money to pay those bills. See 12 Pa.C.S. §5104 comment 4 (1984). Consideration of the debtor's assets under (ii) is particularly appropriate here where the debtor had only one meaningful asset and no stream of income. Thus I find the parties' failure to establish and absence of disputed material facts regarding the debtor's remaining assets precludes summary judgment under both subsections (i) and (ii) of §5104(a)(2).

Nevertheless, I will briefly discuss the submitted evidence regarding the debtor's business and anticipated business needs. Such an analysis is also necessary under both subsections (i) and (ii). Subsection (i) requires the court to determine whether the debtor's remaining assets are unreasonably small in light of its business activities, and subsection (ii) requires the court to determine whether the debtor intended or reasonably should have believed that the challenged transfer would have left the debtor unable to pay its bills as they became due. Similar to my conclusion

regarding the existence of a factual dispute as to the debtor's remaining assets, I also conclude that material disputed facts exist regarding the debtor's business and anticipated business needs at the time of the Steeple Run collateral mortgage. The Trustee relies on the undisputed fact that the debtor needed millions of dollars to fund development of the IVC property, and it had no way of generating revenue at the time. It fully encumbered its only asset with the collateral mortgage. Thus, the Trustee asserts, as a logical conclusion that the debtor was doomed to fail and would be unable to pay its then extant bills, which consisted of ongoing real estate taxes and RDA loan payments. On the flip side, Prudential insists that the Debtor was merely a landholding company in 2011 and therefore did not need millions of dollars at that time. Prudential also notes that the Debtor had access to funds from its affiliates that would enable it to pay its ongoing bills and did, in fact, obtain additional capital to fund development for Prudential in later years.

I find evidentiary holes in both parties' positions. First, from the Trustee's side, the Trustee takes it as a given that evacuating the equity from IVC property necessarily prevented the debtor from obtaining financing to complete the IVC project. I do not find this assumption to be self-evident. Granted, a real estate development company

would be in a stronger financial position if the property it owned and intended to develop had millions of dollars in equity that could be used to obtain development financing. But it is not entirely clear to me that a developer would be unable to procure development financing in the absence of such equity, much less that a developer's company would be doomed to fail. The Trustee has developed no evidence on this point. Plus, I cannot ignore the fact that the debtor did in fact obtain a construction loan in 2014, albeit from Prudential. Without some additional evidence, perhaps expert testimony, I am unwilling to draw the inference on this bare record that the Trustee asks me to make. Now if the Trustee develops a record that the debtor's business in 2011 required millions of dollars in equity to succeed or to pay its bills as they became due, the outcome may differ.

Prudential's theory has its own set of problems. Without drawing any final conclusion, I do find some intuitive appeal in Prudential's argument that the debtor was merely a landholding company in September 2011, and therefore did not need millions of dollars in development financing at that time. This assertion also has some evidentiary support because it is undisputed that the debtor delayed development of the IVC property until several years after the Steeple Run transaction. And,Gualtieri testified that the debtors delayed development of the IVC property at least in part to try to

time "the market." See See Gualtieri Deposition at 80. However, it remains clear that the ultimate purpose of IVC was to develop the property and the actions taken in 2011 could have ramifications when the time finally came for IVC to commence the development process. I need further evidence or argument on this issue

Also,Prudential fails to point to probative evidence demonstrating that the reasonably anticipated ultimate capital needs of the debtor as of September 2011 were such that the debtor could reasonably assume that it could raise the money that it needed. Concerns I have include whether the debtor reasonably would need unencumbered equity in the IVC property to obtain subsequent financing. Prudential's observation that the debtor did obtain such financing in 2013 and afterward, while of some probative value, does not entirely cure the problem. I note that the debtor's acquisition of additional funds for Prudential may have been enabled in part by IVC's appreciation in value from 5.8 million in 2011, arguably to $6.4 million in 2013, and $7.8 million in 2014. Was such appreciation reasonably certain in 2011 when the debtor granted the Steeple Run collateral mortgage? That determination requires that I engage in fact finding which I may not do at the summary judgment stage.

Also, the additional financing came from a lender with

whom the debtor had an existing relationship, perhaps suggesting that Prudential was,to put it colloquially, "in for a penny, in for a pound," and that the financing from Prudential might not otherwise have been obtainable in the open market. My point here is that the record is bare and that the fact that the debtor subsequently acquired development funds standing alone does not demonstrate that the transfer of the collateral mortgage in 2011 did not leave the debtor with unreasonably small assets in light of its business needs. Or at a minimum, I will have to engage in fact finding even if I do not receive additional evidence on the issue. Nor does the subsequent Prudential financing demonstrate that the Debtor reasonably should have believed that after the transfer it could pay its bills as they became due.

A similar logic undermines Prudential's reliance on the mere fact that the debtor obtained development financing following the transfer, particularly since it was obtained from Prudential. A business' access to necessary financing

years after a challenged transfer that syphoned off a significant portion, or perhaps all of the business' equity, does not necessarily prove that the transfer did not impair the business to such a degree that it was likely to fail, or to be unable to pay its bills as they fell due.

I'll also note that I perceive some ambiguity under the PUVTA regarding how to treat the debtor's access to and receipt of funds from its affiliates which the debtor apparently used to pay its ongoing obligations for property taxes and RDA loan payments. I noted in my May 2019 memorandum that any value the debtor received in the challenged transfers should be viewed from the perspective of the debtor's creditors. See 604 B.R. at 196. Perhaps such an approach also is proper under §5104 of the PUVTA when considering the debtor's financial condition following its alleged transfers. From a creditor's perspective, a debtor's dependence upon funding from affiliates that is based on an informal relationship rather than contractual obligations may justifiably appear ephemeral and unreliable. Such a source of funding depends solely on the continued largess of the gifting affiliates. Plus, I may be persuaded, but I do not at this time decide, whether the availability of funds from the debtor's affiliates establishes the kind of financial soundness that subsections (i) and (ii) of §5104(a)(2) require. In other words, without more evidence

at summary judgment, I cannot determine that the debtor's reliance on the resources of its affiliates permits any finding of an undisputed fact under §5104(a)(2). I mention this issue to flag it for the parties as an issue that may play a greater role as litigation progresses. The bottom line is the only way I could grant summary judgment with respect to this first transfer would be to engage in fact finding at the summary judgment stage. I am not prepared to do so.

The next two transfers challenged by the Trustee derive from the 2013 IVC loan agreement. These claims involve, first, the Debtor's putative receipt of $1.4 million in funds and incurrence of an obligation to repay the 1.4-million-dollar loan. I'm referring to the 2013 IVC loan. The second is the debtor's grant of a mortgage to Prudential securing that repayment, that mortgage being the Durham mortgage. The Trustee's argument under subsections (i) and (ii) of §5104 is relatively straightforward. The 2013 IVC loan required the debtor to allocate the majority of the 1.4-million-dollar loan for use by its affiliates. Accordingly, the debtor, arguably, only received approximately $280,000 in value for incurring an additional $1.4 million in debt while granting an encumbrance of $1.4 million on its only asset. In that effect of the loan and mortgage left the debtor with $7.8 million in mortgages on its property, then valued at 6.4

million. At that time, the debtor had only $10 in cash reserves, had not generated any revenue, had not yet commenced construction on the IVC development project, and still needed millions of dollars to develop the IVC property, according to the Trustee. Thus, the Trustee asserts that the transfer left the debtor with an unreasonably small capital for its business and unable to pay its bills as they came due.

In response, Prudential notes that in July 2013 Gualtieri asserted that the debtor was not short of equity and was poised to be successful. Further, in September 2013, Gualtieri did not believe that the 2013 IVC loan would render the debtor unable to pay its bills, in part because the proceeds from the Durham house sales would be funneled back to the debtor and would enable the debtor to pay the bills. Prudential also argues that the value of the IVC property exceeded the encumbrances on it even after the additional 1.4-million-dollar mortgage is added to the property. Prudential reaches this conclusion by again asserting that the Steeple Run collateral mortgage should be discounted down from its face value, based on the then-existing equity shortfall for Durham which Prudential calculates as $770,000. Adding to the $770,000 the remaining balance of the RDA loan, the then 6.4-million-dollar IVC property had a net value of more than -- net equity of more than $2 million, according to Prudential.

Upon consideration of the parties' arguments and evidence

and for largely the same reasons articulated in detail in connection with the Steeple Run collateral mortgage,I conclude material issues of disputed fact remain with respect to both subsections (i) and (ii) in connection with the 2013 transaction. Primarily, there are still disputed issues regarding how to calculate the debtor's assets under 12 Pa.C.S. §5101(b). In September 2013 the debtor still had only one primary asset, the IVC property. The parties have not presented persuasive evidence how this court can discount the value at summary judgment of the Steeple Run collateral mortgage, first in 2011, now again in 2013. I am unable, under the summary judgment standard, to determine the value of the debtor's only piece of property. I again cannot determine whether the debtor's assets were unreasonably small in relation to its business, or whether the debtor would have been able to and should have known that it could not pay its debts as they fell due.

In addition, I reiterate my observation that the parties did not present persuasive evidence regarding the debtor's ability to access necessary credit in light of its reduced equity following this transfer. The availability of such access to credit may be crucial in determining whether the added encumbrances to the IVC property would have significantly increased the likelihood that the debtor's IVC project would fail or would have rendered the debtor unlikely

to pay its bills as they came due.

Prudential cites instances of the Debtor, specifically Gualtieri, soliciting outside investors prior to the debtor's transfer of significant equity through the IVC loan in 2013, and Prudential asserts that because at least one potential investor offered Gualtieri a deal for financing in exchange for an interest in IVC, IVC had the ability to generate sufficient profits to sustain its operations at that time. See Prudential's Memorandum in Support of Motion for Summary Judgment at 13. However, because this offer and Gualtieri's accompanying projections of the IVC project success preceded the challenged transfer, they do not persuasively demonstrate that the debtor's financial strength or access to necessary capital following the transfer would be adequate.

Also lurking in the shadows of this transaction is the Debtor's access to and use of affiliate funds to pay bills as they came due, and how this court should view the debtor's financial position under §5104 in light of that informal business relationship between the Debtor and its affiliates. Thus, for substantially similar reasons as those described in my analysis of the Steeple Run collateral mortgage, I find that the parties have not demonstrated an absence of material disputed facts with respect to the debtor's remaining assets and business needs following the 2013 IVC loan and the grant

of the Durham mortgage in connection with them. Neither party has demonstrated an entitlement to summary judgment under subsections (i) or (ii) of §5104(a)(2).

Next I turn to the Calnshire collateral mortgage. I reach the same conclusion with respect to the parties' motions for summary judgment with respect to this mortgage. The parties' arguments regarding this mortgage largely track their arguments regarding the other challenged transactions. The Trustee asserts at the time of this transfer the debtor had only $1,500 in working capital to fund its business operations. Debtor's grant of the Calnshire collateral mortgage further encumbered the IVC property by the face amount of the mortgage, approximately $5.1 million. Together with the other liens on the IVC property, the RDA loan mortgage, the Steeple run collateral mortgage, and the September 2013 IVC mortgage, the IVC property was encumbered by almost $13 million in mortgages and worth only $7.8 million according to the Trustee. Since the debtor still needed several millions of dollars to develop the IVC project, the Trustee asserts that the transfer of the 2014 collateral mortgage left the debtor inadequately capitalized and unable to pay its debts as they became due.

Prudential responds by first noting that the Calnshire collateral mortgage secured the Durham Calnshire loan, which is May of 2014 had a remaining balance of only $2.8 million.

The Durham Calnshire loan was also secured by the Calnshire property which was worth approximately $2.6 million. We are again looking at the argument that the equity shortfall left the debtor exposed for only $200,000. If reduced to that level as an encumbrance on the IVC property, Prudential calculates that IVC still had a net equity of over $3 million. Prudential's argument again assumes that the mortgages on the IVC property should be calculated only by looking at the equity shortfall on the additional collateral. I have previously explained why I disagree with that. Further, Prudential notes that the Debtor was able to acquire some capital in May of 2014 from Gualtieri's brother and his wife and from Nancy Maychuk who, the parties agree, is Gualtieri's girlfriend. Thus, Prudential contends that the granting of the Calnshire mortgage did not leave the debtor with insufficient capital to sustain its operations; nor should the debtor have reasonably believed that the mortgage would render it unable to pay its debts as they became due. Once again, I find the parties' positions are flawed for largely the same reasons as those explained in my analysis of the Steeple Run collateral mortgage and the September 2013 loan agreement. There are still disputed issues of fact with respect to what assets remain to the debtor following the grant of the mortgage.

Like the Steeple Run collateral mortgage, the Calnshire

collateral mortgage gave Prudential the unqualified right to foreclose on the IVC property upon default for the entire principal amount of the mortgage, which is 5.1 million. Thus, the face value of the Calnshire collateral mortgage is the appropriate starting point for determining the encumbrance on the property, and again the parties have not provided evidence which would allow me to make any determination about discounting that amount based on any reduced probability that the Calnshire collateral mortgage would be called upon the default by the primary obligor. I am unable to quantify the remaining assets of the debtor following this transfer in any way that would permit a grant of summary judgment.

In addition, the parties have not provided evidence regarding the debtor's ability to obtain development financing following the transfer of the Calnshire collateral mortgage. The Trustee relies solely on the face value of the mortgages and assumes the Debtor would be unable to obtain development financing. As I stated previously, this assumption is not entirely self-evident to me and I have no evidence on the issue to substantiate the Trustee's assumption. Prudential points to two instances in May 2014 where the debtor did obtain some financing for the IVC project. However, the financial transaction with Gualtieri's brother and his wife appears to have occurred on the same day that the debtor granted the Calnshire collateral mortgage to Prudential,

that date being May 30, 2014.
Therefore I cannot determine whether this transaction should be considered as occurring subsequent to or prior to the Calnshire collateral mortgage. And as I stated earlier, the inquiry under (i) and (ii) of §5104(a)(2) is a forward-looking inquiry starting with the time of the challenged transfer, even if the financial transactions occurred prior to the collateral -- Calnshire collateral mortgage transaction. The transactions are not especially
probative in determining whether the debtor would have been able to obtain financing to finish the IVC project following the grant of the Calnshire collateral mortgage.

It appears likely that this transaction occurred contemporaneously with the grant of the Calnshire collateral mortgage, so that determining which transactions occurred first may be of little value. In any case, the significance of these transactions is just unclear. Moreover, it is not obvious that a capital infusion from insiders who appear to already have ties to the Gualtieri entities actually demonstrates that the debtor was on solid financial footing with respect to its anticipated business needs or its present and ongoing obligations. The same issues arise with respect to the other investor, Nancy Maychuk.

For all these reasons, I conclude the parties have failed to demonstrate a lack of disputed material facts. The

evidence at this point simply does not demonstrate what assets remained to the debtor following the transfers or whether the debtor could reasonably anticipate that it could obtain financing or pay its bills. Accordingly, both parties' request for summary judgment with respect to the Trustee's transfer and recovery action will be denied.

I next turn to Prudential's motion for summary judgment in connection with the lender liability action. The Trustee's lender liability action consists of claims for breaches of the lending contracts including the covenant of good faith and fair dealing and for tortious interference with contracts.

I will first address the breach of contract claims. Distilled from the Trustee's Response and Surreply, the Trustee contends that Prudential breached the lending contracts and specifically the implied duty of good faith and fair dealings, by refusing to honor its commitment to refinance the Lava loan, threatening foreclosure when Prudential knew no default existed and delaying the release of funds for the development of the IVC property. The Trustee also refers to what he considers Prudential's improper conduct in declaring sham defaults and efforts to change reporting and draw requirements in an effort to take over the IVC project in violation of a court order.

In its motion for summary judgment and reply to the

debtor's submissions, Prudential argues that the Lava loan is irrelevant to alleged breaches of the lending contracts. The Debtor was in fact in default as of February 2016 when draws were delayed, and any delay in funding the draw and escrow release requests were due to the Debtor's own failure to submit required supporting documentation. Regarding the implied duty of good faith and fair dealing, Prudential insists that it was only acting in a manner consistent with the clear terms of the lending contracts.

Pennsylvania contract law is well established and the principles are very basic. To recover for breach of contract a plaintiff must prove 1) the existence of a contract including its essential terms; 2) the breach of a duty imposed by the contract; and 3) resulting damages. See,e.g., In Re Green Goblin, Inc., 470 B.R. 739, 749, (Bankr. E.D. Pa. 2012). When performance of an obligation arising under a contract is due, any failure on the part of the party charged with that obligation amounts to a breach. See Green Goblin, 470 B.R. at 749. Every contract in Pennsylvania also has an implied duty of good faith and fair dealings. See Donahue vs. Federal Express Corporation, 753 A.2d 238, 242, (Pa. Super. Ct. 2000). However, these implied duties do not override express provisions in a contract. See Wells Fargo Bank, N.A. vs. Chun Chin Yung, 317 F.Supp.3d 879, 888 (E.D. Pa 2018). The implied duty of good faith and

fair dealings may be invoked where a contracting party exercises a contract right but does so in a manner that is unreasonable and oppressive and takes undue advantage of the counter-party, thereby frustrating the overarching purpose of the contract. The burden of proof in a contract action is on the party asserting the breach, and the standard is preponderance of the evidence. Green Goblin, 470 B.R. at 749.

The Trustee alleges three explicit breaches of the lending contracts by Prudential. I will discuss each in turn and focus on the evidence submitted by the parties, then I will follow up to analyze how the evidence squares with the Trustee's theories regarding the implied duty of good faith and fair dealing.

I begin with the Lava loan as the first of the Trustee's breach of contract claims. The Trustee asserts that Prudential breached the lending contracts by reneging on its agreement to purchase or refinance the Lava loan. A few background facts will help frame this discussion. It appears undisputed that Prudential required the debtor to raise at least $600,000 in additional funds as a precondition of entering into the 2014 IVC Construction Loan. To satisfy Prudential's demand, the debtor and Gualtieri's father, Francesco Gualtieri, as joint borrowers, obtained a $625,000 loan from Lava Funding, LLC.

Prudential, through its then-Vice President, Salvatore Fratanduono, the vice president, sent letters to Lava Funding on October 20, 2014, promising to refinance the loan balance of the Lava loan no later than 15 days prior to its loan maturity, and it was a short-term loan. Prudential also sent letters to Francesco Gualtieri on November 21st, 2014, in which it made similar promises. Debtor argues that Prudential made these promises in order to induce the Debtor to accept the loan terms offered by Lava Funding and to induce Lava Funding to make the loan. Lava Funding did make the $625,000 loan to the debtor and Francesco Gualtieri on December 1st, 2014. The note obligated the borrowers to repay interest only from January to December 2015 at which time a final balloon payment would fall due. Prudential reneged on its promises to Lava Funding and Francesco Gaultieri to refinance the loan balance when the time for its performance came due in November 2015.

Lava Funding subsequently commenced litigation against Prudential, the debtor, Renato Gaultieri and Francesco Gaultieri, which ultimately was settled by the parties six months later.

The Trustee maintains that Prudential's failure to perform the Lava loan obligation was a factor that led to the demise of the IVC development project. And the Trustee

asserts that Prudential's failure to honor its commitments with respect to the Lava loan constituted a breach of the lending contracts between Prudential and the debtor.

Prudential responds primarily by asserting that Prudential's actions with respect to the Laval loan are irrelevant for the Trustee's breach of contract claims. Specifically, Prudential argues that its alleged failure to refinance Lava loan cannot be construed as a breach of the 2014 construction loan. After reviewing the evidence submitted by the parties, I agree with Prudential. The Trustee has failed to demonstrate that the agreements or promises from Prudential to Lava Funding or Prudential to Francesco Gaultieri were part of the lending contracts between Prudential and the Debtor, IVC.

The commitment letters sent by Prudential to Lava Funding and to Francesco Gaultieri do not reference the lending contracts between the Debtor and Prudential; nor are they addressed to the debtor. Likewise, the Lava loan note does not reference the lending contracts between the Debtor and Prudential, although it does refer to Prudential's promise to refinance the loan.

Thus, neither the Lava loan nor Prudential's commitment letters demonstrate any connection to the lending contracts between the Debtor and Prudential. The inverse is also true. The 2014 construction loan agreement does not recognize or

incorporate the agreements between Prudential and Lava funding, or Prudential and Francesco Gaultieri. It does contain a reference to Lava Funding in Section 1.5, which relates to the payments the debtor was to receive from the sale of the first 25 homes in the IVC project. However, this bare reference does not establish a connection sufficient to demonstrate that Prudential's promises to refinance the Lava loan should be considered part of the loan contract between the debtor and Prudential.

This result does not change, even if I accept that, through these letters, Prudential intended to induce the debtor, Lava Funding, and Francesco Gaultieri to enter into the separate Lava loan agreements. From the evidence submitted, it appears Prudential merely insisted that the Debtor raise additional capital as a pre-condition to its own infusion of funds into the IVC project. Such insistence, standing alone, would not make Prudential a party to the lending agreements between the debtor, Francesco Gaultieri, and Lava Funding.

Even giving the Trustee all beneficial inferences, the current evidence does not establish that Prudential's promises for Lava Funding and Francesco Gaultieri were part of the lending contract between Prudential and the debtor.

Accordingly, there is no present support in the record for the conclusion that Prudential's decision to renege on its

promises to Lava lending and Gaultieri, suggested by the Trustee, would constitute a breach of any express contractual provision between Prudential and the debtor.

My conclusion is reinforced by the fact that the record is devoid of any evidence connecting this breach to any damage suffered by the debtor. As discussed in my prior memorandum regarding the limited scope of this court's subject matter jurisdiction reported at 598 B.R. 552, it appears that the Lava Loan has been repaid by Prudential, and Prudential does not appear to have made any claim in this bankruptcy case against the debtor based on the Lava loan.

That said, I make no conclusive determination regarding the admissibility of trial evidence regarding the Lava loan transaction. It is possible that this evidence could constitute a part of the evidentiary framework to support a claim for a breach of the implied duty of good faith and fair dealing.

But standing alone, the Lava loan transaction did not give rise to any claim for a breach of contract based on any express contractual provision.

I now move on to the Trustee's contention that Prudential breached its lending contracts with the debtor by repeatedly threatening to declare a default and foreclose, when Prudential knew such default did not exist. The Trustee asserts that such stark repudiation of its agreements with the

debtor constituted an anticipatory breach of contract. In response, Prudential points out that it paid $680,000 to fund site approval work at the IVC property in the months following the November and December 2015 meeting, in which the Trustee alleges such anticipatory repudiation occurred.

Prudential argues that it is, therefore, impossible to few any alleged threats of foreclosure as anticipatory breaches of its lending contracts. Again, I agree with Prudential. A party's renunciation of a contract constitutes an anticipatory breach if the party states an absolute and unequivocal refusal to perform, or a distinct and positive inability to do so. See In re: St. Mary's Hospital, 101 B.R. 451, at 457 (Bankr. E.D. Pa. 1989).

The Trustee offers as evidence the November and December 2015 meeting notes between Debtor representatives and bank representatives. Those notes were composed by Gaultieri. And those notes were attached to a declaration submitted with the Trustee's motion through the declaration of Michael Cordone, its attorney. These are at Exhibits 16 and 17. I have serious doubt about the competency of this evidence. See Federal Rule of Civil Procedure 56(c)(2).

But even if I consider this evidence, it does not help the Trustee. According to the Trustee, in both of these meetings, Prudential's representatives informed Gaultieri of

their belief that the debtor was in breach of the lending contracts. On the basis of this and certain other assertions, Prudential insisted that Gaultieri accept new lending terms. See the Cordone Declaration, Exhibit 16, which includes quotations such as, "You are in default; we can foreclose on you." Another quotation is, "We are not negotiating with you. We are telling you what we want going forward or we will foreclose on you."

Prudential, however, indicated its willingness to continue financing the IVC project, but only on its own terms. The import of the Cordone Declaration was: "if you agree on everything, we will not foreclose. You have my word on it. We will continue to finance Island's view."

Crucially, however, Prudential never stated unequivocally that it would not perform under the lending contracts with the debtor. Rather, Prudential threatened to foreclose, which was a remedy permitted by the lending contracts upon the debtor's default. This distinction is important.

In the cases cited by the Trustee, the parties found to have anticipatorally breached their contracts, made statements or took actions indicating an absolute and unequivocal refusal to perform their contractual obligations. The breaching parties did not, as Prudential did here, merely accuse the other party of default, and threaten to exercise contractual remedies.

The cases cited by the Trustee, therefore, are inapposite. In addition, Prudential did not actually cease performance under the contract, following the November and December 2015 meetings. Its ongoing performance is entirely inconsistent with the legal standard here, that legal standard being an absolute and unequivocal refusal to perform.

I also point out that Prudential's email correspondence with the debtor following the November and December 2015 meetings demonstrates Prudential's intention to continue to fund the IVC project, (although, as will be discussed, Prudential did begin to insist that the Debtor submit additional documentation with its draw requests, which the lending contract permitted Prudential to do).

This all does not arise to an anticipatory breach of contract. Viewed in context, Prudential's statements at the November and December 2015 meetings cannot reasonably be considered to be an anticipatory breach of the lending contracts. The evidence shows that Prudential's allegations of default and threats of foreclosure were merely part of an aggressive negotiating posture.

I recognize that the Trustee has offered the Cordone Declaration, which if accepted, would suggest that Prudential's agents knew or believed that the debtor was not in default when they made the threats at the November and December 2015 meeting.

However, even accepting that fact, potential statements do not constitute an anticipatory breach of the lending contracts. At best, that conduct may be relevant in evaluating whether it exercised its contractual rights consistent with the implied duty of good faith and fair dealing.

Finally, I turn to the heart of the Trustee's alleged breaches of expressed contractual provisions. Prudential's failure to fund, draw requests, and escrow disbursements in a timely manner under the lending contracts. The Trustee references several such draw requests and escrow disbursements. See Trustee's Response to Prudential's Motion at 19-20, and Cordone's Declaration at ¶ 50.a I will discuss them one at a time. But before I do, it is helpful to describe briefly a few of the contract provisions that are relevant.

Section 5.2 of the 2014 construction loan agreement specifies the draw request process by which the debtor would receive funds for construction of the IVC project. See Exhibit 5 to the Cordone Declaration.

In relevant part, Section 5.2 states that disbursements and advances shall be made upon written application for payment in a form and content satisfactory to Prudential. Section 5.2(b) further states that Prudential reserved the right to approve the form and content of each application, and

to verify the representations made by an inspection of the real property and the improvements.

Section 5.3 obligated Prudential to fund such draw requests on or about three business days after receipt of an application, provided that Prudential had inspected and verified various representations the Debtor to make in connection with the draw request.

Also relevant here, Section 5.4 states in part that Prudential would not have an obligation to fulfill draw requests if the debtor was in default of its obligations under the contract.

Now, on to the draw requests. The first draw request that the Trustee alleges occurred was that Prudential unduly delayed a draw request submitted by the debtor on December 1st, 2015. The Trustee emphasizes that the contractual obligation was to fund such draw requests on or about three business days after receipt of an application. Prudential failed to release funds for the December 1st, 2015 draw request until January 16, 2016, 46 days after the request was made.

Relying on the Cordone Declaration, the Trustee further alleges that this was the first draw request for which Prudential demanded additional invoices, schedules, and other documentation, and insisted on writing check directly to the subcontractors. See Cordone Declaration ¶ 50.

The Cordone Declaration also states that the debtor's first nine draw requests from July 24th to November 18th, 2015, were typically funded within three business days. In response, Prudential points out that Gaultieri admitted that Prudential was contractually entitled to verification of the work performed. This included receipt of invoices from particular vendors. See Gaultieri Deposition at 600-602.

Gaultieri also admitted that the loan agreement permitted Prudential, at its sole discretion, to issue checks directly to any subcontractor or material. See Gaultieri Deposition at 372, and the 2014 Construction Loan Agreement ¶ 5.5.

Prudential further points out that emails from Prudential's employees show that Prudential only delayed fulfillment of this draw request because the debtor had not submitted the subcontractor's names, addresses, or amounts due in connection with the December 1st, 2015 draw request.

For example, one of Prudential's senior vice presidents, Douglas Smith, emailed the debtor's counsel on January 6th, 2016, stating that the bank was only waiting on this information to make payment. See Exhibit D to Prudential's Reply in Support of its Motion for Summary Judgment

In another email dated January 14th, 2016, another

Prudential senior vice president, Alex Nadalini, asserted that Prudential had informed the Debtor, at least by December 24th, 2015, that Prudential would fund all legitimate costs directly related to the IVC project, provided that the Debtor submitted the required documentation. See Exhibit 27 to the Cordone Declaration.

And on January 15th, 2016, Douglas Smith informed the Debtor by email that the December 1, 2015 draw request would be fulfilled the following day. See Prudential's Reply at Exhibit E.

Though not stated in the January 15, 2016 email, or shown by any other evidence submitted to the court for that matter, Prudential asserts that it did, in fact, release the funds to fulfill the December 1, 2015 draw request upon receipt of the necessary supporting documentation from the Debtor. And I do not see any place where the Trustee has disputed this fact.

Upon review of the evidence submitted by the parties regarding the December 1, 2015 draw request, I find a number of disputed issues of material fact remaining. Despite the massive amount of discovery conducted in this case, neither party submitted the December 1st, 2015 draw request itself, or the supporting documentation, if any, the debtor provided. That said, the evidence just discussed does demonstrate the following undisputed facts.

The debtor submitted a draw request on December 1st,

2015, at least by January 14th, and perhaps as early as December 24th, Prudential requested the names of payees in order to pay them directly, and Prudential apparently fulfilled this draw request on January 16th, 2016, by writing checks directly to the subcontractors.

It is also clear to me, based on Gaultieri's testimony and Section 5.5 of the Construction Loan Agreement, that Prudential had the right in its sole discretion to issue checks directly to the subcontractors. However, some key factual issues remain unclear regarding this draw request.

The record does not disclose when Prudential made its demand to the debtor for additional information, whether the first such request made on December 24th, or January 14th, or January 16th for the names of the subcontractors and the additional information that was required for direct payment. This is significant, because the contract may fairly be interpreted as imposing a duty upon Prudential to either fund or deny the draw request on or about three days after receipt of the application. See Construction Loan Agreement ¶ 5.3.

If, upon receipt of the December 1 draw request, Prudential waited until December 24th, or perhaps even later, to make this demand for the first time, and otherwise ignored the draw request until then, then the Trustee may have a viable claim that Prudential breached its obligations, and an actionable

claim, assuming that all of the other elements of a breach could be established (e.g., that the Debtor incurred damages as a result of this delay).

But giving the Trustee the benefit of all favorable inferences, Prudential has not demonstrated that it did not breach the lending contract with the debtor when it did not properly fund or deny the December 1st draw request.

I recognize that the contractual procedure for disbursement of funds in the 2014 construction loan agreement contains some conditions precedent to Prudential's duty to perform. However, Prudential does not argue that any conditions precedent, other than the debtor's failure to provide the names and addresses of the subcontractors, would justify its failure to fund or deny the debtor's draw request made on December 1st within three business days.

Next, I turn to the January 14, 2016 draw request. Although it's not entirely clear in the record, it appears the Debtor submitted this draw request on January 14th. See Cordone Declaration ¶ 50(b)(i) and Exhibit 30 and 31 thereto.

After the initial submission of this draw request, the Debtor resubmitted the draw request on January 25th. According to an email from Cordone to Prudential, Prudential had requested that additional information be included, which Cordone attached to the resubmitted draw request. Exactly

what additional information Prudential requested, or when, is unclear from the record. Cordone stated in the email that the revised draw request replaced the January 14th draw request. A week later, or more than a week later, perhaps on February 1st, the Debtor again resubmitted the same revised draw request to Prudential.

At least according to Cordone's email, the Debtor then resent the same revised draw request and supporting documentation that it had sent on January 25th, 2016. The only evidence in the record regarding the February 1st resubmission, which is Cordone's February 1st email, indicates that the January 25th and February 1st resubmissions were identical.

Therefore, the record supports a finding that Prudential funded the January 14th draw request ten days after the debtor first submitted, and revised, and properly documented the request on January 25th. The record suggests, therefore, that the draw request was honored in early February. Prudential offers no explanation why it waited ten days to fund the request after the request was revised with supporting documentation on January 25th. Again, Prudential has not demonstrated that the Trustee cannot establish a claim for a breach of contract with request to the January 14th request.

The next draw requested issue was made on February 10th, 2016. According to Michael Cordone, the February 10th, 2016

draw request was not honored until April 13th, 2016. It appears that the only evidence regarding this request is the Cordone's Declaration, which does not cite to any of the exhibits attached to the Declaration to support his attestation. However, Mr. Cordone was representing the Debtor during this period, and his emails to Prudential demonstrate his involvement in the draw request process.

Prudential has not submitted any evidence that would undermine the Cordone Declaration regarding this draw request, and whether through inadvertence or deliberate omissions, Prudential does not reference this draw request in any of its memoranda.

Therefore, for purposes of evaluating Prudential's motion for summary judgment, I will accept the Cordone Declaration regarding the February 10th draw request. The record, therefore, supports the Trustee's allegation that there was a breach of the lending contract by funding the February 10th draw request more than two months after its submission.

Prudential does argue in its reply memorandum that the debtor was in default of a loan document as of February 2016. See Prudential's Reply at 27. The event giving rise to the alleged default was the debtor's failure to deposit in an escrow account with Prudential all security or escrow deposits on the property.

Gaultieri admitted at his deposition that the debtor

received a number of escrow deposits from Prudential buyers, but did not deposit those amounts in an escrow account. See Gaultieri Deposition at 353-354. Rather, the debtor deposited these funds in his operating accounts and used them to fund construction. Gaultieri recalled Prudential asking that those funds be deposited in an escrow account, but the Debtor never did so. See Gaultieri Deposition at 355-356.

On even a cursory reading of the 2015 Construction Loan agreement, a default by the debtor appears to eliminate Prudential's obligation to fund draw requests. See Construction Loan Agreement ¶ 5.4.

However, Prudential did not send a notice of default to the Debtor until February 19th, 2016. See Prudential's Reply at Exhibit J. That notice stated that the Debtor's failure to deposit the escrow amount with Prudential, under Section 3.24 of the loan agreement, within 30 days of the date of the letter would constitute an event of default pursuant to Section 9.1(b) of the loan agreement.

Thus, assuming the default when uncured, it appeared that the Debtor would not have been in default until at least March 20th, 2016. Prudential would have, therefore, been obligated to fund the February 10th draw request under the operative terms of the loan agreement within three days.

Therefore, I again conclude that Prudential has failed to

demonstrate that the Trustee cannot establish a breach of contract with respect to the February 10th draw request.

Next, is the Trustee's alleged claim with respect to draw request dated April 18, 2016. The Trustee relies solely on the Cordone Declaration, which states that Prudential never distributed the requested funds. In response, Prudential argues that this draw request was not funded because it impermissibly sought to pay the debtor's drywall contractor for work performed by other contractors.

Prudential cites Gaultieri's deposition testimony regarding the April 18th draw request. Gaultieri reviewed that draw request, which requested funding from various types of completed work, including rough electric, trim, and paint, tile, and kitchen. See Gaultieri Deposition at 526-530 tHowever, the draw request asked Prudential to pay the costs for all those completed work items solely to the drywall contractor, about $27,000. Gaultieri admitted that this $27,000 was intended to pay the drywall contractor for work it had completed earlier in the year.

Here is what happened. The Debtor submitted a draw request for payment of the drywall contractor's work in January 2016. Prudential funded that draw request, giving those funds directly to the debtor. Instead of paying the drywall contractor, the Debtor used those funds to pay other expenses. Thus, at the time of the April 18th draw request,

the drywall contractor had not been paid for the prior work, and the Debtor had already drawn all of the funds that should have been -- had already expended all of the funds that should have been paid to the drywall contractor.

To remedy that situation, the Debtor attempted to use funds it would receive through the April 18th draw request that should have gone to other contractors to pay the drywall contractor for the prior work. Gaultieri admitted that such shifting of funds was no permitted under the 2014 Construction Loan Agreement. See Gaultieri Deposition at 497-498.

Prudential caught wind of this shifting payment scheme. In the April 25th email between Prudential and the debtor, Prudential points out that the vendor payment for this April 18th draw request to the drywall contractor appears to cover much more than just the list -- the drywall's installation expenses. See Cordone Declaration at Exhibit 41.

Accordingly, Prudential asked the Debtor to clarify the amount, and whether the drywall contractor performed all of the work listed. Viewing the evidence, even in the light most favorable to the Trustee, it is impossible to see how a breach of contract could be sustained with respect to the April 18th draw request.

Gaultieri agreed that the 2014 Construction Loan

Agreement did not permit the debtor to use funds allocated for the payment of one contractor to pay a different contractor. Therefore, when the debtor submitted a draw request indicating that disbursements for various contractor work would actually be paid to a different contractor, Prudential was well within its rights to refuse that disbursement, at least until the Debtor changed or clarified the draw request.

And from the evidence submitted, I see no indication following Prudential's expressed concerns on April 25th that the Debtor provided such a change or clarity.

Thus, Prudential's failure to fund the April 18th draw request did not constitute a breach of contract. In addition, as noted earlier, the debtor appears to have been in default by March 20th for failing to deposit escrow funds in an escrow account. The debtor had 30 days to cure the default, and there was nothing to indicate that the debtor did so. In fact, Gaultieri admitted as much. See Gaultieri Deposition at 355-356.

Under Section 5.4 of the loan agreement, such a default eliminated Prudential's obligation to fund draw requests. Thus, summary judgment in Prudential's favor is warranted regarding the April 18th draw request.

The last express contractual breach asserted by the Trustee involves Prudential's failure to fund an escrow release, requested on February 12th, 2016. The escrow was not

released until April 13th, 2016. Escrow releases are governed by a separate contract among Prudential, the debtor, and the Bristol Bureau Water and Sewer Authority. So I will call that the Tri-Party Agreement. See Exhibit 60 to the Cordone declaration.

The Tri-Party Agreement operated differently than the 2014 loan agreement. Under paragraph 7 of the Tri-Party Agreement, Prudential was required to disburse funds promptly once the bureau made a proper and timely demand for such funds. This obligation was unconditional. Prudential had no discretion with respect to disbursement of funds; nor could the Debtor's insolvency or default impair Prudential's obligation to disburse those funds.

Now, turning to the evidence regarding the February 12th escrow release request, on February 12th, 2016, the debtor submitted a properly supported escrow release that had been approved by Bristol Bureau. All prior escrow release requests, each identical in form and content, had been funded within three business days. However, despite the contractual obligation to promptly disburse the funds, Prudential failed to fund the February 12th escrow release request until April 13th, approximately 60 days later.

The Trustee asserts that Prudential's failure to timely find the draw requests and escrow releases that I've discussed caused substantial project delays, and disharmony and

disruption in the relationships between the debtor and its subcontractors, and that these problems ultimately prevented the debtor from completing the IVC project.

The Trustee relies on the Cordone Declaration ¶ ¶ 50-51, about which I question probative value. But the Trustee also cites to the declaration of Bernie Sauer, who was the project of the IVC devlopment from September 2015 to March 2016. The Debtor laid off Sauer, along with the entire site staff in March 2016 due to lack of funding.

The Trustee has since re-hired Mr. Sauer as the project manager as of September 2018. Mr. Sauer stated that Prudential's delays and non-payments caused numerous subcontractors to begin cutting their work hours at the IVC project in February 2016. By March 2016, Sauer stated that most subcontractors stopped showing up, and refused to do any more work until they were paid.

In its reply, Prudential does not challenge these allegations, at least the allegations that it failed to fund the February 12th escrow release request. Instead, Prudential argues that the Trustee has failed to show that any breach caused any damages to the debtor. Prudential notes that when asked, Gaultieri could not recall whether delaying the February 12th escrow release prevented any site work from being performed. See Gaultieri Deposition at 841.

However, viewed in the light most favorable to the Trustee, I find that Prudential has failed to demonstrate that the evidence negates any essential element of the Trustee's claim for breach of contract with respect to the February 12th escrow release request. First, on the question of breach, the Tri-Party Agreement obligated Prudential to promptly disburse the funds upon the receipt of a timely and proper release request from Bristol Bureau. It's undisputed that Prudential didn't fund the February 12th escrow release request, which had been approved by Bristol Bureau until April 13th.

As to the issue of damages, the only affirmative evidence I have relating to breaches to damages are the declarations of Cordone and Sauer. Both of them state that the delays caused problems with the subcontractors, ultimately leading to the demise of the project. Neither of declarants specify whether it was Prudential's failure to timely fund draw requests, or the February 12th escrow release that damaged the IVC project.

However, it is a reasonable inference from their declaration to say that both delays contributed to the project's demise. Accordingly, viewing the evidence in the light most favorable to the Trustee, the declarations support the conclusion, if barely, that delays in funding, draw requests, and the escrow release request damaged the IVC project and damaged the Debtor.

Prudential's citation to Gaultieri's Depositions as

demonstrating a lack of damages, is unpersuasive.Gaultieri merely could not recall whether the delayed escrow release specifically prevented any site work from being performed. Such testimony does not undermine Sauer's affirmative declarations that the delayed escrow release did damage the project.

I note in particular that Sauer, as the on site project manager, appears to have been best positioned to observe the effect of non-payment on the subcontractors. Thus, Prudential has failed to demonstrate an entitlement to summary judgment regarding the February 12th escrow release request.

I pause at this point to address a related argument that Prudential raises concerning causation generally. Prudential asserts that the IVC project's demise is attributable solely to the debtor, Gaultieri's, project mismanagement and deliberate misuse of funds. See Prudential Memorandum at 41 to 43, and Prudential's Reply Memorandum at 36-42.

Prudential references numerous exhibits in support of this contention, including Gaultieri's own admissions to some of Prudential's mismanagement or misuse of funds. See Prudential's Statement of Undisputed facts at ¶ ¶ 34-43 and 49 to 66.

Thus, Prudential claims that the Trustee is unable to demonstrate in its contract or tort claims that Prudential's conduct directly and proximately caused any damage to the IVC

project or the debtor.

However, based on the evidence just discussed, namely the Sauer Declaration and perhaps the Cordone Declaration, it is apparent that the cause of the demise of the IVC project is disputed. This makes summary judgment on causation grounds inappropriate.

Summing up my discussion so far, the evidence submitted supports summary judgment for Prudential on the Trustee's breach of contract claims with respect to Prudential's failure to purchase or refinance their Lava loan, any alleged anticipatory breach of contract, and a breach of contract in connection with the delay or failure to fund the April 18th draw request.

However, the evidence does not support summary judgment on the Trustee's breach of contract claims with respect to the December 1, 2015, January 14, 2016, February 10, 2016 draw requests, and a February 12th, 2016 escrow release request.

Before considering the Trustee's claim that Prudential also breached its contract with the debtor by breaching the implied duty of good faith and fair dealing, I pause briefly to make two observations. First, I am aware of Prudential's argument that the debtor was in default of the construction loan agreement by virtue of its misappropriation of draw requests, which if deemed a material breach, would excuse Prudential from further performance of its obligations under

the parties' agreement.

Further, it does appear that the B. Rilie, Advisory Services expert report submitted by Prudential suggests these misappropriations preceded all of the draw requests that I had previously discussed. However, after reviewing Prudential's memoranda and arguments, I conclude that Prudential has not argued that the debtor was in material default of the construction loan agreement prior to February 2016.

To the extent Prudential has raised the argument regarding the earlier misappropriations, it has done so only with respect to its lack of causation argument and its *in pari delicto* defense

The potential success of a more comprehensive argument on this point also requires an analysis of the Construction Loan Agreement and a demonstration that the default of this nature is one that does not require a declaration and notice of default. Prudential has not developed this argument, and it is not the Court's role to do so on Prudential's behalf. Therefore, at this time, I will not consider this theory of defense.

My decision in this regard is reinforced by the overall record before me regarding the interrelationship among the various Gaultieri affiliates. While I am aware that some of the alleged misappropriations, as described in the expert

report, appeared to be for the personal benefit of Gaultieri, many may also have been for the benefit of other Gaultieri real estate development entities.

Considering the provisions of the various loan agreements that I have already discussed, which contemplated that revenues from one entity might be available to another entity, it is possible that as finder of fact, I may be persuaded by the Trustee that the parties' relationship was such that this type of conduct, the use of the funds in the manner described by the expert report, was known and even countenanced by Prudential, and does not support a finding that it constituted a material breach by the Debtor. In any event, all of this requires me to exercise my role as fact finder, which I cannot do on summary judgment.

I turn now to the Trustee's claim that Prudential also breached its contract with the debtor by breaching the implied duty of good faith and fair dealing. The Trustee alleges that Prudential breached this duty through declarations of sham defaults, efforts to change reporting and draw requirements, delays or refusals to honor or fund draw requests, and efforts to take over the IVC project in violation of a court order.

In response, Prudential insists it was only acting in a manner consistent with the clear terms of the lending contracts. Since some of the Trustee's claims for express breaches of the contract will survive, I will not exhaustively

analyze the issue of whether Prudential breached its implied duty of good faith and fair dealing.

Based solely on the evidence already discussed, it is apparent that the Trustee potentially can succeed on this claim. Take, for instance, the evidence related to the draw requests. I have already explained why the evidence supports the Trustee's claim for breach of contract under Section 5 point -- for breach of contract.

Under Section 5.3 of the Construction Loan Agreement, Prudential was obligated to fund or deny draw requests within three days of receipt of the request. However, the 2014 construction loan agreement also specifies that the draw request shall be in a form and content satisfactory ro the bank, and that Prudential has a right to approve the form and content of such draw requests. See Construction Loan Agreement ¶ 5.2.

Thus, Prudential may be able to demonstrate at trial that its demands for additional documentation in the draw request was duly authorized by the contractual provision. Indeed, it appears that way. Nevertheless, Prudential's sudden insistence on additional documentation may constitute a breach of the implied duty of good faith and fair dealing, particularly if it was motivated by extrinsic purposes, as the as the Trustee appears to maintain.

As I have stated earlier, the implied duty may be

implicated where contracting parties exercises a contractual right, but does so in a manner that is unreasonable and oppressive, and takes undue advantage of the counter party to frustrate the overriding purpose of the contract.

Another case I would cite for that proposition is Tanenbaum, v. Chase Home Finance, LLC, 2014 WL 4063358 at *7 (E.D. Pa. August 18th, 2014).

By abruptly demanding additional documentation that perhaps it had never sought before, and perhaps about not being clear as to what it needed in its new demands, Prudential may have inched over the line and breached the implied duty. What I would say at this point is that the record developed for me on summary judgment does not eliminate this possibility. And I would need to see all of the evidence at trial to make a final determination on it.

Prudential points to Gaultieri's deposition in which he admitted that certain types of verification information sought by Prudential for the draw requests was reasonable. See Gaultieri Deposition at 499-500.

However, the Cordone Sauer's Declarations paint a more complicated story. Cordone states that Prudential attempted to change the requirements for draw requests multiple times. See Cordone Declaration ¶ 42

According to Cordone, Prudential refused to provide a

complete list of new draw requirements, even after his repeated requests that Prudential do so. See Cordone Declaration ¶ ¶ 27-28.

On February 18th, 2016, Cordone e-mailed Prudential and stated those concerns, and complained that it was difficult for the debtor to hit, depicted by Cordone as a moving target. See Cordone Declaration at Exhibit 26.

Bernie Sauer, the project manager, who sat in on conference calls between Gaultieri and Prudential, supports the view that the bank's request for information created a moving target. Sauer also stated that a representative of Prudential visited the site in January 2016, and indicated that he had checks written out to subcontractors in his desk drawer, but would not release them without an agreement from the debtor to alter the process for funding requests. See Sauer Declaration ¶ 17.

Taken together, I find this evidence creates a disputed issue of material fact regarding the manner in which Prudential exercised its contractual rights. Even though the Construction Loan Agreement gave Prudential discretion over the form and content of draw requests, the implied duty of good faith and fair dealing required Prudential exercise that discretion in a reasonable and unoppressive manner.

Accepting Sauer and Cordone's Declarations, as I must, unless contradicted by other indisputable evidence,

Prudential's alleged conduct could demonstrate a violation of the implied duty of good faith and fair dealing. See generally Somers v. Somers, 613 A.2d 1211, 1213 Pa. Super. Ct 1992).

The Somers case cites the Restatement Second of Contracts for the proposition that bad faith includes the evasion of the spirit of the bargain, and abuse of power to specify terms. Further, the Trustee points to numerous other instances that allegedly demonstrate Prudential's bad faith conduct. In particular, Cordone asserted that Prudential was attempting to manufacture or find a default as part of a larger attempt to undermine the Debtor, and permit Prudential to de-leverage its lending position. See Cordone Declaration ¶ 45.

I am skeptical that such an allegation, if proved, would by itself constitute a violation of the implied duty of good faith and fair dealing. However, such allegations do potentially add weight to the scale when evaluating in the totality of circumstances whether Prudential breached its implied duty of good faith and fair dealing.

For these reasons, I find that Prudential has not demonstrated an entitlement to summary judgment regarding the Trustee's claims for breach of the implied duty of good faith and fair dealings.

I next address Prudential's motion to dismiss the

Trustee's claim for tortious interference with contract. Pennsylvania law recognizes the tort of intentional interference with an existing contractual relationship. See Adler Barash, Daniel Levin, and Creskoff, v. Epstein, 393 A.2d 1175, 1182 (Pa. 1978)

The general elements that a plaintiff must establish for such a claim are the existence of a contractual relationship between a plaintiff and a third party; purposeful action by defendants, specifically intended to harm an existing relationship; the absence of a privilege or justification on the part of the defendant; and legal damage to the plaintiff as a result of the defendant's conduct. See Acumed, LLC v. Advanced Surgical Services Incorporated, 561 F.3d 199 at 212 (3d Cir. 2009). See also Brokerage Concepts Incorporated v. U.S. Health Care Inc., 140 F.3d 494, 530 (3d Cir. 1998).

However, Pennsylvania Courts have not deemed all forms of interference as tortious. Of particular relevance here, Pennsylvania courts distinguish between interference directed at a third party's performance under a contract with the plaintiff, and interference directed at plaintiff's own performance under that contract.

Section 766 of the Restatement sets forth the definition

for tortious interference with a contract that a defendant directs at a third party's performance. It provides that one who intentionally and improperly interferes with a performance of a contract, other than a contract to marry, between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject to liability for the pecuniary loss resulting from the failure of the third person to perform the contract. Restatement Second of Torts, §766 (1979).

By contrast, Section 766A of the Restatement provides the a different definition for tortious interference of contract. It provides:

"One who intentionally and improperly interferes with the performance of a contract, except a contract to marry, between another and a third person by preventing the other, that is, the plaintiff, from performing the contract or causing his performance to become more expensive or burdensome is subject to liability to the other for the pecuniary loss resulting to him."

The Pennsylvania Supreme Court has adopted the definition for tortious interference as set forth in Restatement Section 766. Adler Barash,393 A.2d at 1182.

See also Windsor Securities Inc. v. Park Third Life Insurance Company, 986 F.2d 655 at 659 (3d Cir.1993).

The Pennsylvania appellate courts have declined to expand the tort of interference with an existing contract to include the type of interference described in §766A of the Restatement. See Phillips v. Selig, 959 A.2d 420, 436, n.13 (Pa. Super. Ct.2008); see also Karps, v. Massachusetts Mutual Life Insurance Company, 2018 WL 1142189 at *13 (E.D. Pa., Feb. 28, 2018).

Thus, to substantiate a cause of action in Pennsylvania for tortious interference with contracts, a plaintiff must show that the defendant's interfering contract was intended to induce or otherwise cause the third party not to perform the contract.

Where a defendant interferes only with the plaintiff's own performance under a contract, such conduct will not result in liability under a tortious interference theory. See Karps. In its submissions, Prudential argues that none of Prudential's actions were directed at or toward any third party that had a contract with the debtor. Rather, all of Prudential's actions recited by the Trustee in support of the tortious interference claim, such as delaying payment of draw requests, were directed to the Debtor.

Prudential further argues that any harm the Debtor suffered from its subcontractors refusing to work due to non-

payment was the direct result of the debtor's diversion and misappropriation of funds. In response, the Trustee argues that Prudential tortiously interfered with its subcontractors and suppliers on the IVC project, and with purchasers of residential properties by refusing to disburse funds under the terms of the Construction Loan Agreement.

Prudential insisted that it pay the subcontractors and suppliers directly, but then refused to disburse the funds when requested for the subcontractor's work. According to the Trustee, this failure to pay the subcontractors constitutes interference directed at third parties, and resulted in damage to the debtor when these subcontractors refused to provide additional services at the IVC project.

The Trustee also asserts that Prudential's failure to fund the IVC project was targeted at the purchases of the IVC homes, IVC project homes, because its failure to pay the subcontractors and vendors necessarily prevent completion of the homes.

Upon review of the parties' arguments, I conclude that Prudential has demonstrated its entitlement to summary judgment on the Trustee's claim for tortious interference. Section 766 of the Restatement requires that the defendant have induced or otherwise caused third parties here, subcontractors, vendors, and homeowners, not to perform their contracts with the debtor.

The comments to Section 766 explain and give examples for the terms induced and otherwise caused. The term induce represents persuasion and operates in the mind of the third party induced. See Restatement § 766, Comment h. Inducement leaves the third party free to perform its contract with the plaintiff, but the third party has been persuaded or intimidated into not performing.

By contrast, the term "otherwise causing" refers to situations where the interfering party leaves the third party with no choice by rendering performance of the contract impossible. The interfering parties' imprisonment of a third party or disruption of goods that the third party was to deliver to the plaintiff are examples of this kind of causation.

Applied here, the evidence does not show in any way that Prudential induced or otherwise caused the subcontractors, vendors, and home purchasers not to perform their contracts with the Debtor. Instead, the evidence shows that Prudential's actions, if anything, simply interfered with the Debtor's own performance of its contracts with the subcontractors, vendors, and home purchasers.

Take, for instance, the home purchasers. The Trustee has submitted a list of persons who submitted deposits for the purchase of homes on specific lots in the IVC project. The Trustee argues that Prudential's refusal to fund draw requests

was directed at the purchasers of these homes, because of failure to pay the subcontractors and vendors necessarily prevents completion of the homes.

However, the evidence failed to demonstrate that Prudential induced or otherwise caused these home purchasers not to perform on their contracts. Rather, it is apparent that Prudential's refusal to fund certain draw requests simply interfered with the Debtor's own performance, that is building the homes, that the purchasers had placed deposits upon.

Similarly, Prudential's failure to pay the subcontractors and vendors relates to the debtor's failure to perform on its contracts with those third parties. The Construction Loan Agreement specifies that Prudential would only fulfill draw request applications after work was completed on the IVC project. See Construction Loan Agreement¶ 445.2. The evidence is that the subcontractors would bill the debtor for work they had already completed. See Trustee's Response ¶ 19 and Exhibit R; Gaultieri Deposition at 497-498; and Cordone Declaration at Exhibit 31.

Thus, for the contracts between the Debtor and the subcontractors, the Debtor's failure to pay was a failure of its own performance. By failing to fulfill draw requests, Prudential interfered only with the Debtor's performance, since the subcontractors had already performed their work.

The Trustee points to no evidence in the record that

would show that Prudential's actions interfered with the subcontractor or vendor's ability to perform under their contracts with the debtor.

Thus, while the evidence may demonstrate a theory of liability under Restatement §766A, it does not show tortious interference under Restatement §766. And as I stated earlier, Section 766A has not been adopted in Pennsylvania.

Accordingly, Prudential is entitled to summary judgment on the Trustee's claim for tortious interference with the contract.

In response to both the Trustee's tort and contract claim, Prudential also raised the defense know as *in pari delicto*. Prudential argues that *in pari delicto* operates as a defense to liability, where plaintiff's own wrongful action substantially causes the damages the plaintiff seeks to recover. Applied here, Prudential contends that the debtor and Gaultieri's alleged misconduct, including fraudulent inducement of Prudential, fraudulent misappropriation of funds, and mismanagement of the IVC project prevent the Trustee from recovering on the breach of contract claim and the tortious interference claim, (although the latter is a moot point, since I'm granting summary judgment on that claim on other grounds.

The Trustee responds by arguing that the defense of *in*

pari delicto requires that the plaintiff participated in or bears substantial equal responsibility for the underlying illegality giving rise to damages. Since neither the Debtor nor Gaultieri participated in or is responsible for Prudential's breach of contract, the Trustee argues that the evidence does not support a defense of *in pari delicto*.

I conclude that Prudential has not demonstrated entitlement to summary judgment based on the defense of *in pari delicto*. At the outset, I note my skepticism that *in pari delicto* applies here at all. Stated succinctly, the doctor provides that the plaintiff may not assert a claim again a defendant if the plaintiff bears fault for the claim. See Official Committee of Unsecured Creditors v. RF Lafferty and Company, Incorporate, 267 F.3d 340 (Third Circuit, 2001). The Pennsylvania Supreme Court has noted that the defense of in pari delicto has been applied principally in cases involving illegal contracts or illegal conduct. See Official Committee of Unsecured Creditors of Allegheny Health Education and Research Foundation v. PriceWaterhouseCoopers, 989 A.2d 313, 328 (Pa. 2010).

Under Pennsylvania law, if parties engaged in fraud or other illegality seek a common law redress relative to matters in which they bear sufficient culpability, the

doctrine of *in pari delicto* relieves the courts from lending their offices to mediating disputes among wrongdoers. See Allegheny Health and Education Research Foundation 989 A.2d at 329. For *in pari delicto* to apply, the plaintiff must be an active, voluntary participant in the wrongful conduct or transaction, and bear substantial, equal, or greater responsibility for the underlying illegalities compared to the defendant.

Applied here, it is difficult to see how Prudential can successfully raise an *in pari delicto* defense. The contracts that form the basis of the Trustee's claims, whether the lending contract between the debtor and Prudential, or the contracts between the debtor and third parties, are not themselves illegal, nor is there any evidence that the Debtor bears any responsibility for Prudential's alleged contract breach actions for which the Trustee seeks damages.

Prudential's allegations of various misconduct on the part of the debtor in Gaultieri may serve to reduce or eliminate liability that the debtor -- that Prudential might have towards the bankruptcy estate should the Trustee prevail on any of his claims. But as currently presented, Prudential's allegations seem more properly raised as conventional contractual defenses to the Trustee's contractual claims. For these reasons, I find that summary judgment is not warranted in Prudential's favor based on *in pari delicto*.

Prudential also argues that even if I do not grant summary judgment on the lender liability claims, I should dismiss as a matter of law the Trustee's demand for lost profits. Prudential asserts that the lost profits alleged by the Trustee are speculative, at best. Prudential points out that the Trustee has not produced an expert report in support of its alleged lost profits. And Prudential emphasizes that the Debtor never completed any significant portion of the IVC project.

In response, the Trustee argues that no expert testimony is needed to establish lost profits, as courts have recognized that an owner or executive of a business may be competent to testify regarding projected lost profits. Moreover, the Trustee relies upon Prudential's own projection for sales and compares them to the actual sales made while the Trustee has been in charge of the project. See Trustee's Response, Exhibit T, at ¶ ¶ 25 to 31.

I agree with the Trustee on this issue. Prudential has not pointed out any case law that states that expert testimony is required to establish lost profits. In fact, it appears the courts do not impose such a requirement. Lightning Lube Incorporated v. Witco Corporation, 4 F.3d 1153 at 1175 (3d Cir. 1993).

Additionally, Prudential does not challenge the basic and intuitive methodology by which the Trustee has calculated the

lost profits of the IVC project. Accordingly, Prudential has not demonstrated that the evidence demonstrates an entitlement to judgment in its favor as a matter of law regarding lost profits. The issue is one that requires fact finding, which is inappropriate at the summary judgment stage.

Lastly, I addressed Prudential's motion for summary judgment on the Trustee's claim for equitable subordination. I have previously discussed the elements of equitable subordination in an earlier opinion in this case, In re Island View Crossing LP, 604 B.R. 181, 202-03. I incorporate that discussion by reference. I need only review a few of the legal principles regarding equitable subordination at this time.

Under Section 510(c)(1) of the Bankruptcy Code, a bankruptcy court may, under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim, or all or part of an allowed interest to all or part of another allowed interest.

The Third Circuit has specified that equitable subordination is proper when the claimant has engaged in some type of inequitable conduct, the misconduct resulted in injury to the creditors or conferred an unfair advantage on the claimant. And, equitable subordination is consistent with the provisions of the Bankruptcy Code. See In re Windstar

Communication Inc., 554 F.3d 382,411-12.

In its submissions, Prudential argues that the Trustee's equitable subordination claim also merits summary judgment. The starting point for this argument is Prudential's insistence is that summary judgment is appropriate on all of the Trustee's other lender liability claims.

If I agreed to dismiss all of the lender liability claims, then Prudential would have been found to have acted appropriately in accord with its contractual rights. The necessary implication for such a finding is that the Trustee would be unable to establish the requisite inequitable conduct for equitable subordination to apply.

So to some extent, at least, Prudential's argument is contingent on my dismissal of the Trustee's other lender liability claims. However, I have found that at least some of the Trustee's claims survive. Most importantly, the Trustee's claim for breach of the implied duty of good faith and fair dealing has survived summary judgment. At bottom, while the parties are entitled to enforce contracts to the letter, even to the great discomfort of their trading partners, the enforcement of a contract can turn into inequitable conduct. The disputed facts here that permit the implied duty claims to survive summary judgment also tend to support the equitable subordination claim.

While it is possible that as fact finder I might find tfacts that render the implied duty and the equitable subordination claim meritorious, or I might find both claims non-meritorious, or the implied duty claim meritorious, but the equitable subordination claim non-meritorious, those determinations all involve fact finding that I will not engage in at the summary judgment stage.

Therefore, Prudential's motion for summary judgment on the equitable subordination claim will be denied. That concludes this lengthy bench opinion. When it is ready to be docketed as a transcript of this recitation, I will do so with an accompanying consistent order.

(Court adjourned)

CERTIFICATION*

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Lewis Parham 8/23/21

Signature of Transcriber Date

*The transcript has been modified and edited by the court prior to its docketing, but is largely the same as the electric sound recording.

Date: August 24, 2021

ERIC L. FRANK
U.S. BANKRUPTCY JUDGE